Zaini bin Che Awang & Ors v Pegawai Penerima Syarikat Cosmopro Planner Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO AT2-21–390 OF 2009
SURAYA OTHMAN J
22 SEPTEMBER 2014

Civil Procedure — Setting aside — Default judgment — Application to set aside default judgment made out of time without explaining reason for delay and under wrong order and rule of court — No application made for extension of time to file setting aside application — Counsel acting for affected party present in court when application for default judgment made and asked for cause papers from plaintiff's solicitor after judgment entered — Whether setting aside application defective and incurable — Whether O 1A and O 2 of the Rules of Court 2012 could not be invoked to cure defect/irregularity as rules of court had been intentionally and completely disobeyed

The instant application by the third defendant, Mercu Sa-laam Sdn Bhd, was to set aside a judgment in default of defence obtained by the plaintiff. Contending that the judgment was irregular, because the statement of claim had not been served, and that even if the judgment was regular it should be set aside as there was a defence on the merits, the third defendant applied to set aside the judgment and dismiss the plaintiff's claim pursuant to O 13 and O 19, respectively, of the Rules of Court 2012 ('the ROC').

Held, dismissing the application with cost of RM2,000:

(1) The application was defective as it was not made pursuant to the correct order or rule of the ROC. Order 13 r 1 had nothing to do with the setting aside application at hand while O 19 r 1 allowed the court to dismiss a plaintiff's claim after the period fixed under the rules for service of the statement of claim had expired. The correct provision the third defendant should have applied under was O 42 r 13 to which O 13 r 8 could also have been cited or cross-referred (see para 6).

(2) Pursuant to O 42 r 13 of the ROC, the instant application should have been filed within 30 days after receipt of the default judgment/order. But in this case, the application was filed 71 days after the default judgment and no explanation was offered for the delay. The applicant also failed to apply for extension of time to file the setting aside application under O 3 r 5 or under O 92 r 4 of the ROC. There was intentional and complete disobedience to comply with the Rules of Court. In those circumstances, it was not justified for the court to invoke O 2 and O 1A of the ROC to

cure the defect/irregularity. The plaintiffs had suffered injustice and prejudice due to the indolent and recalcitrant attitude of the third defendant (see paras 9 & 32–33).

(3) When the application to enter default judgment was made on 24 October 2013, the third defendant's counsel was present and as such she was fully aware of the default judgment and should have taken steps to set it aside. This she failed to do. The affidavit evidence also showed that after the default judgment was obtained, the third defendant's lawyer had telephoned and written a letter to request for the cause papers and the same was supplied to her (see paras 29–30).

[Bahasa Malaysia summary

Permohonan ini oleh defendan ketiga, Mercu Sa-laam Sdn Bhd, adalah untuk mengetepikan penghakiman ingkar pembelaan yang diperolehi oleh plaintif. Berhujah bahawa penghakiman adalah tak teratur, kerana pernyataan tuntutan tidak diserahkan, dan bahawa walaupun penghakiman adalah teratur ia patut diketepikan kerana terdapat pembelaan atas merit, defendan ketiga memohon untuk mengetepikan penghakiman dan menolak tuntutan plaintif masing-masing berikutan A 13 dan A 19 Kaedah-Kaedah Mahkamah 2012 ('KKM').

Diputuskan, menolak permohonan dengan kos sebanyak RM2,000:

(1) Permohonan adalah cacat kerana ia tidak dibuat berikutan aturan atau kaedah KKM yang betul. Aturan 13 k 1 tidak bersangkut paut dengan pengetepian permohonan ini sementara A 19 k 1 membenarkan mahkamah untuk menolak tuntutan plaintif setelah tempoh tetap di bawah peraturan untuk penyerahan pernyataan tuntutan tamat tempoh. Peruntukan yang betul defendan ketiga patut pohon adalah A 42 k 13 yang A 13 k 8 boleh juga dirujuk atau dirujuk balas (lihat perenggan 6).

(2) Berikutan A 42 k 13 KKM, permohonan ini patut difailkan dalam tempoh masa 30 hari selepas menerima penghakiman/perintah penghakiman. Tetapi dalam kes ini, permohonan difailkan 71 hari selepas penghakiman pengingkaran dan tiada penjelasan diberikan untuk kelewatan. Pemohon juga gagal untuk memohon bagi pelanjutan masa untuk memfailkan permohonan pengenepian di bawah A 3 k 5 atau di bawah A 92 k 4 KKM. Terdapat keingkaran berniat dan lengkap untuk mematuhi Kaedah-Kaedah Mahkamah. Dalam keadaan ini, ia tidak berjustifikasi untuk mahkamah membangkitkan A 2 dan A 1A KKM untuk mengatasi kecacatan/ketidakaturan. Plaintif-plaintif mengalami ketidakadilan dan prejudis akibat sikap malas dan keras kepala defendan ketiga (lihat perenggan 9 & 32–33).

(3) Apabila permohonan untuk memasukkan penghakiman pengingkaran dibuat pada 24 Oktober 2013, peguam defendan ketiga ada dan oleh itu

dia mengetahui tentang penghakiman pengingkaran tersebut dan patut mengambil langkah untuk untuk mengetepikannya. Ini dia gagal berbuat sedemikian. Keterangan afidavit juga menunjukkan bahawa selepas penghakiman pengingkaran diperolehi, peguam defendan ketiga telah menelefon dan menulis surat untuk memohon bagi kertas kausa dan ianya diberikan kepadanya (lihat perenggan 29–30).]]

Notes

For a case on default judgment, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 8310.

Cases referred to

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223; [1997] 1 CLJ 396, CA (refd)

MBT (Malaysia) Sdn Bhd v Asa Wira Sdn Bhd [2004] MLJU 24; [2004] 1 CLJ 671, HC (refd)

Ong Guan Teck & Ors v Hijjas [1982] 1 MLJ 105 (refd)

Pacific Inter-Link Sdn Bhd v Pemilik Kapal Atau Vesel 'Makatsarija' [1999] MLJU 721; [2000] 2 CLJ 679, HC (refd)

Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors [1997] 1 MLJ 453; [1996] 4 CLJ 461, CA (refd)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85; [1996] 3 CLJ 321, CA (refd)

President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd [1997] MLJU 216; [1998] 1 CLJ 169, HC (refd)

R v Bloomsbury and Marylebone County Court, ex p Villerwest Ltd [1976] 1 All ER 897; [1976] 1 WLR 362, CA (refd)

Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [1998] 4 MLJ 297, CA (refd)

Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678, HC (refd)

Legislation referred to

Rules of Court 2012 O 3 r 5, O 13, O 13 rr 1, 8, O 19, O 19 r 1, O 32 r 13(2), O 42 r 13, O 92 r 4

Rules of the High Court 1980 O 1A, O 2

Mohaji Selamat (Mohaji, Hazury & Ismail) for the plaintiffs.
Shopna Rani Malakar (Rani Malakar & Co) for the third defendant.

Suraya Othman J:

INTRODUCTION

[1] This is an application by the third defendant, Mercu Sa-laam Sdn Bhd, to set aside the judgment in default of defence obtained on 24 October 2013 under O 13 and to dismiss the plaintiff's claim under O 19 of the Rules of Court 2012 (PU(A) 205/2012) ('the RC 2012'). The third defendant alleged that they had not been served with the statement of claim and as such the default judgment obtained is irregular. They also alleged that if the default judgment is obtained regularly, then it can still be set aside since they have a defence on merits, ie they have raised an arguable or triable issue to be tried in a full trial.

DECISION OF THE COURT

[2] It must be noted that this civil suit, No 21–390 of 2009 has been consolidated and will be heard together with Civil Suit No 22–1179 of 2009. In Civil Suit No 22–1179 of 2009, judgment in default of appearance had been entered against the third defendant by the plaintiffs on 2 October 2009. The third defendant has applied to set aside the default judgment and I have on 17 February 2014 dismissed their application with costs of RM2,000. The third defendant has appealed against my decision and I have written my grounds of judgment on 7 April 2014 (Rayuan No B-02(IM)-526–03 Tahun 2014). The issues or arguments raised by the third defendant in their application in Suit No 22–1179 of 2009 and those raised in Suit No 21–390 of 2009 (present application) are similar and I will adopt my grounds of judgment in that suit (No 22–1179 of 2009/Rayuan No B-02(IM)-526–03) in this present suit (No 21–390 of 2009).

APPLICATION UNDER O 13 R 1 AND O 19 OF THE RC 2012 IS DEFECTIVE AND ABUSE OF PROCESS OF COURT

[3] The third defendant filed the application to set aside the judgment in default of defence under O 13 and O 19 of the RC 2012. The plaintiffs' counsel, Mr Mohaji Selamat submitted that the application is defective since the third defendant should have made the application under O 42 r 13.

[4] I agree with learned counsel for the plaintiffs.

[5] Order 13 r 1 provides for the plaintiff to enter a final judgment against a defendant for a liquidated amount claimed if the defendant fails to enter an appearance within the time permitted under the rules. It has nothing to do with the setting aside application at hand. As to O 19 r 1, it allows the court to

dismiss the plaintiff's claim after the expiration of the period fixed under the rules for service of the statement of claim but the specific order that should have been cited by the third defendant's counsel would be O 42 r 13. I am bewildered that Ms Shopna Rani Malakar had not been specific in quoting the provisions under the RC 2012 by which she is making this application. One has to be specific and not generalise in stating under which order or rule one is making and not expect that 'one size fits all' for any or every application one makes to the court.

[6] As pointed out by Mr Mohaji Selamat, the correct order for Ms Shopna Rani Malakar to cite or refer to in the setting aside application would be O 42 r 13. If I may add, she can also cite or cross-refer to O 13 r 8 since it provides for the setting aside of any judgment including that of a default judgment of defence which is the crux of her application. Since she failed to cite or refer to the correct order or rule, I find her application to be defective.

APPLICATION FILED OUT OF TIME OR AFTER THE 30 DAYS LIMITATION UNDER O 42 R 13 OF THE RC 2012

[7] Order 42 r 13 states:

> Setting aside or varying judgment and orders (O 42 r 13)
>
> 13 Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment *shall make an application* to the Court and serve it on the party who has obtained the order or judgment *within thirty days after the receipt of the order or judgment by him*. (Emphasis added.)

[8] Order 13 r 8 states:

> Setting aside judgment (O 13 r 8)
>
> 8 The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.

[9] Order 42 r 13 imposed upon the third defendant to file the setting aside application within 30 days after the receipt of the default judgment order. In our present application, Ms Shopna Rani Malakar filed the said application on 2 January 2014, 71 days after the judgment of default was entered. No explanation was offered for the delay.

[10] Let us examine O 42 r 13. A perusal of O 42 r 13 discloses that the drafters have used the terminology 'shall', ie 'shall make an application within thirty (30) days after the receipt of the order or judgment'. The word 'shall' denotes that the provision is mandatory and must be adhered to strictly. In *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85;

[1996] 3 CLJ 321, the Court of Appeal held that the word 'must' is equated in meaning to the word 'shall' and implies a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. Siti Norma Yaakob JCA (as she then was), in delivering the judgment of the court held that the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion.

> The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall' and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion to state otherwise would defeat the very purpose of O 32 r 13(2) was intended ie to prevent any last minute affidavit being filed so as to protract the hearing of any proceedings in chambers.

[11] In *Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd* [1996] 2 MLJ 678, Abdul Kadir Sulaiman J (as he then was), considered the word 'must' in the context of O 32 r 13(2) and held that the word 'must' is an imperative word and in its ordinary meaning is a word of absolute obligation. In his judgment, he stated:

> Order 32 r 13(2)(a) uses the imperative word 'must'. In its ordinary meaning, it is a word of absolute obligation. Therefore, for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of the learned counsel for the defendant that it renders the said affidavit inadmissible. Order 2 r 1 of the RHC would not be of help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said affidavit apart from using the order as a shield.

THE QUESTION HERE IS, CAN THE NON-COMPLIANCE WITH THE REQUIREMENT OF O 42 R 13 BY THE THIRD DEFENDANT BE RECTIFIED

[12] Mr Mohaji Selamat submitted that the third defendant should have first filed an application for an extension of time or enlargement of time to file the said application and give a reasonable or satisfactory explanation for the inordinate delay. This, the third defendant failed to do.

[13] I agree with learned counsel for the plaintiffs. The RC 2012 are comprehensive and exhaustive. There are provisions in it for the enlargement or the extension of time under O 3 r 5. Order 3 r 5 allows time to be extended by the court, even after the expiration of that period and by consent in writing by parties without a court order. Order 3 r 5 states:

> Extension of time (O 3 r 5)

5(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the Court being made for that purpose.

[14] As stated earlier, the third defendant can seek redress from the court under O 3 r 5 for extension of time to file the setting aside application which is out of time. The third defendant should have filed a formal application for extension of time. This, they had failed to do. Instead, they had by-passed or ignored that requirement and went straight to make the said application. What are the consequences of this failure on their part?

[15] In *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa & Ors* [1997] 1 MLJ 453; [1996] 4 CLJ 461, the Court of Appeal, at held No 5 stated:

[5] Order 32 r 13(2) of the Rules of the High Court 1980 is mandatory in nature. Bearing this in mind, and the fact that the statement of claim was served on 13 April 1994, Eng's affidavit was rightly rejected by the learned judge. On the facts, there was not a word in Eng's affidavit which sought to explain the delay. The delay was therefore perverse. Finego could have applied for extension or abridgment of time under O 3 r 5 of the RHC but that had not been done.

[16] In *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297, the Court of Appeal at held No 1 stated:

Under O 3 r 5(1) and (2) of the Rules of the High Court 1980 ('the RHC'), the court has jurisdiction to extend time even if the application is made after the expiry of the period. The primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

[17] In *R v Bloomsbury and Marylebone County Court, ex p Villerwest Ltd* [1976] 1 All ER 897; [1976] 1 WLR 362 (CA), held that: 'The county court had a wide inherent jurisdiction to control its own procedure. That included the power to enlarge or extend any time limits attaching to an order granted at an earlier hearing by a different judge. The court's powers were not limited to what was expressly stated in the rules of practice and applied even where the application for an extension of time was made after the relevant period had elapsed'.

[18] In *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1997]

MLJU 216; [1998] 1 CLJ 169, it was held that:

> [2] Furthermore, the defendant's affidavit was filed after the hearing had commenced. The defendant should have at least applied to the court for leave to file an affidavit out of time and if it had done so, the court could have exercised its discretion under O 92 r 4 of the RHC. No such application had been made and the affidavit therefore was rejected.

[19] In *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; [1997] 1 CLJ 396, the Court of Appeal when touching on the issue of delay said this:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus*, *non dormientibus*, *jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. *Even in cases where a right is exercisable ex debitio justitiae, a Court may refuse relief to an indolent litigant*.
>
> In all cases in which delay in approaching the court is in issue, *the burden is upon the litigant who has delayed to render a satisfactory explanation for it*. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. (Emphasis added.)

[20] In *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105, Hashim Yeop Sani J (as he then was), held that:

> It is trite law that the court has unfettered discretion to grant or refuse an extension of time. *The first principle is that the rules of court must prima facie be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period*.
>
> In considering whether to grant or refuse extension of time the length of time that has lapsed is always a material factor to be considered by the court exercising the discretion. On the facts of this case I was not able to honestly say that there was any valid ground for the delay and therefore refused the application for extension of time. (Emphasis added.)

[21] As stated earlier, the third defendant should have filed a formal application for extension of time. This she had failed to do. Instead, she had by-passed or ignored that requirement and went straight to make the said 'out of time' application. As stated in *Ong Guan Teck & Ors*, 'the first principle is that the rules of court must prima facie be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period'. And, also, as stated in *Thiruchelvasegaram a/l Manickavasegar*'s case, the 'primary

consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances'.

[22] Thus, since no effort was made whatsoever to file a formal application for extension of time, should not this court just dismissed the setting aside application since the third defendant had intentionally and completely ignored or flout the rules. Besides, a satisfactory or reasonable explanation must be given for the delay and without an application for extension of time with an accompanying affidavit explaining the reasons for the delay, how is the court to consider whether the circumstances as faced by the third defendant justify the delay in making the said application.

[23] On the face that no application for extension of time was made by the third defendant, and the setting aside application is out of time, can this court, on its own motion, cure or rectify the non-compliances on the part of the third defendant under O 2 of the RHC or O 1A of the RHC. Order 2 of the RHC provides that non-compliance with the requirement of the rules shall be treated as an irregularity which can be cured and O 1A states that in administering the rules, the court or judge should have regard to the overriding interest of justice and not only to the technical non-compliance with the rules.

[24] Order 2 states:

> Non-compliance with Rules (O 2 r 1)
>
> 1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, *non-compliance shall be treated as an irregularity* and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) These Rules are a procedural code subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.
>
> (3) The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms to as costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity. (Emphasis added.)

[25] Order 1A states:

> Regard shall be to justice (O 1A)

A In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

B **[26]** In the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329, Zaki Tun Azmi CJ, delivering the decision of the court at paras 4, 43–44, 46 and 50 said this:

C [4] A general provision such as O 1A of the RHC must not supersede a mandatory requirement of the Rules. Order 1A of the RHC cannot be invoked *when a party intentionally disregards in complying with the rules*.

[43] Accordingly, I have no hesitation in answering the first question posed in the positive, that is to say, the requirements of O 6 r 7(2A) are mandatory prerequisites.
D This means that the applications for extension of time for service of the writs made by the respondents are defective as they do not show compliance with the RHC.

[44] Now to O 1A of the RHC. This order relates to the administering of rules to the High Court 1980. In order to invoke O 1A of the RHC, parties must apply the object of the rules first. Order 1A of the RHC reads as follows.

E Order 1 A: Court or judge shall have regard to justice.

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical con-compliance of any of the rules herein.

F [46] *The technical non-compliance of any rules may be remedied where there is an accidental omission or oversight by a party*. A general provision such as O 1A of the RHC 1980 is for the court or judge to give heed to justice over technical con-compliance. It must not supersede a mandatory requirement of the rules. *Order 1A of the RHC cannot be invoked when a party intentionally disregards in complying*
G *with the rules*. Otherwise, parties would be encouraged to ignore the rules. Thus in this case, O 1A of the RHC does not apply as the respondents had intentionally disregarded O 6 r 7 (2A) of the RHC for their own reasons.

[50] As I had mentioned in court, if O 1A is sought to be invoked whenever a party fails to comply with any provision of the rules, then the whole of the Rules of the
H High Court 1980 would be rendered useless. For example, can failure to enter appearance or file defence within the specified period be considered as an irregularity? Of course it cannot be. *A party is late in filing the relevant papers must obtain an order from the court to extend the time, if such extension is required and is permitted* by the rules. Therefore, the answer to question two is in the negative.
I (Emphasis added.)

[27] In the case of *Pacific Inter-Link Sdn Bhd v Pemilik Kapal Atau Vesel 'Makatsarija'* [1999] MLJU 721; [2000] 2 CLJ 679, the court held that:

When the rules of court provide for a specific manner and time frame for the service of an affidavit intended to be used in support of an application, these rules must be fully observed and complied with. This is an absolute obligation where O 2 r 1 of the RHC is of no assistance.

[28] In the case of *MBT (Malaysia) Sdn Bhd v Asa Wira Sdn Bhd* [2004] MLJU 24; [2004] 1 CLJ 671, Abdul Malik Isyak J (as he then was), at p 672 (CLJ), said this:

It is a correct proposition of the law to say that the 'curing provision' should not be wantonly utilised.

It is salutary to recall to mind the sage words of Edgar Joseph Jr J (as he then was), in the case of *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319. There at p 59 (p 325) of the report, His Lordship aptly said:

The rules in my opinion, therefore, have statutory force and are not mere rules of practice. The net result would be this. I refused to exercise my discretion in favour of the plaintiff for the following reason:

(a) that it is a fundamental principle of law that the RHC must be strictly complied with;

(b) that the powers vested in O 2 r 1 of the THC are the exceptions to the general rule, these powers should be exercised sparingly and it should be used to give the litigants a carte-blanche cover to overlook all forms of irregularities;

(c) that in order for the court to exercise its discretion under O 2 r 1 of the RHC , there must be some material to satisfy the court in exercising its discretion;

(d) If the recalcitrant fails to provide any justification or reason for the non-compliance with the rules as embodied in the RHC, then the court ought to be reluctant to cure those defects because O 2 r 1 of the RHC should not be used wrongly; and

(e) a mere omission or oversight on the part of the litigants and their legal advisers should not be an excuse to invoke all pervading powers under O 2 r 1 of the RHC.

[29] Reverting to our present case, at para 15 of the affidavit of Badrul Hisham bin Shamsuddin, affirmed on 23 April 2014 (encl 22), he stated that after the default judgment was obtained against the third defendant, the third defendant's solicitor had telephoned and written a letter to request for the cause papers and he had then supplied them to the said solicitor (exh BD2).

[30] Apart from that when the application to enter default judgment was made on 24 October 2013 before me, the third defendant's solicitor, Ms

Shopna Rani Malakar was present and as such was fully aware of the default judgment and should have taken steps to set it aside. This she failed to do.

[31] A formal application for extension of time is important to explain the reason for delay. In the absence of such application and explanation of the delay, the third defendant has slept on its own right.

[32] As stated before, no application for extension of time was made and no satisfactory explanation was given for the delay in making the application to set aside the default judgment. Further, she could have filed for an extension of time to enlarge the thirty days limitation under O 3 r 5 (general provision for abridgment or enlargement of time) or under O 92 r 4 (inherent powers of the court), but this she did not do. She intentionally and completely ignored the rules and straight away filed the said application. No reasons was given for the delay in the affidavit of Rosli bin Hassan (encls 21 and 23).

[33] As such, on these facts and circumstances, are O 2 and O 1A justified to be invoked by this court, on its own motion, to cure the intentional and complete disobedience to comply with the rules. I would think not. The plaintiffs had suffered injustice and prejudice due to the indolent and recalcitrant attitude of the third defendant.

CONCLUSION

[34] For the reasons outlined above, I dismissed the third defendant's setting aside application with costs of RM2,000.

Application dismissed with costs RM2,000.

Reported by Ashok Kumar